NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOWARD MISLE,

Plaintiff,

v.

SCHNITZER STEEL INDUSTRIES, INC.,

Defendant.

Case No. 15-cv-06031-JSW

ORDER RESERVING IN PART AND DENYING, IN PART, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 60

Now before the Court for consideration is the motion for summary judgment filed by Plaintiff Howard Misle ("Misle"). The Court has considered the parties' papers, relevant legal authority, the record in this case, and it has had the benefit of oral argument on the issue of the litigation privilege. For the reasons set forth in this Order, the Court RESERVES RULING, IN PART, AND DENIES, IN PART, Misle's motion.

BACKGROUND

It is undisputed that Misle, other entities not parties to this lawsuit, and Defendant Schnitzer Steel Industries, Inc. ("SSI") entered into an Asset Purchase Agreement (the "APA") dated April 6, 2011.[1] It also is undisputed that the transaction closed on April 21, 2011 (the "Closing Date"). Pursuant to the APA, SSI agreed, for a sum certain, to purchase "all of the assets

[1] The other entities are American Metal Group, Inc., American Metal & Iron, Inc., AMI Recycling, Inc., AMI Recycling Drive-Thru, Inc., Dimond Metal Recycling, Inc., A-1 International Recycling Consultants, Inc., Metal Brokers Recycling, Inc., L&M Auto Dismantling, Company, Inc., and HNM Properties, Inc. These entities are referred to throughout the APA as the "Selling Parties." Misle is referred to as the "Selling Party Representative."

of the Selling Parties used or held for use in, relating to or arising out of the Business[2], subject to the exclusions and on the terms set forth" in the APA.[3] (Dkt. No. 60-1, Declaration of Howard Misle ("Misle Decl."), ¶ 5, Ex. A, APA, Recitals, ¶ C.)

The parties agreed that a portion of the total purchase price, $5,500,000.00 (the "Escrow Funds" or "Escrow Amount"), would be placed in escrow and held by Wells Fargo Bank, N.A. as escrow agent.[4] (APA, Art. IV, § 4.2(c).) The APA states that the Escrow Funds are "to serve as a source of indemnification for the matters addressed in Article IX and to be held and released under the terms of the Escrow Agreement." (*Id.*)

> Pursuant to the terms of the Escrow Agreement and this Agreement, the Escrow Amount will be divided into two parts as follows: (i) $4,500,000 of the Escrow Amount will be used for indemnification matters addressed in Section 9.2, with $2,250,000 of such portion of the Escrow Amount (less any paid or pending claims) to be disbursed to the Selling Parties on the first anniversary of the Closing Date and the remaining balance of such portion of the Escrow Amount to be disbursed to the Selling Parties on the second anniversary of the Closing Date (less any paid or pending claims); and (ii) $1,000,000 of the Escrow Amount will be used for indemnification matters addressed in Section 9.7 and held until the fifth anniversary of the Closing Date[.][5]

(APA, Art. IV, § 4.2(c).)

The APA also states that "[a]ny Party seeking indemnification shall promptly notify the Party obligated to provide indemnification hereunder of any Loss or Losses, claim or breach, including any claim by a third party, that might give rise to indemnification hereunder, and the Indemnified Party shall deliver to the Indemnifying Party a … Claim Certificate." (APA, Art. IX, § 9.5(a).)

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[2] "Business" is defined as the Selling Parties' "business of collecting, processing, transporting and selling ferrous and non-ferrous scrap metal, glass, plastics and cardboard and other aspects of metals recycling and other materials recycling." (APA, Recitals, ¶ A.)

[3] The total purchase price is not material to this motion.

[4] The APA refers to the $5,500,000.00 as the "Escrow Amount." The Court shall use that term when it is quoting from the APA. Otherwise, it shall use the term "Escrow Funds."

[5] There are other provisos set forth in Section 4.2(c), which are not at issue in this lawsuit.

> If the Indemnifying Party objects to the indemnification of an Indemnified Party in respect of any claim or claims specified in any Claim Certificate, the Indemnifying Party shall deliver a written notice to such effect to the Indemnified Party within 30 days after receipt by the Indemnifying Party of such Claim Certificate. Thereafter the Indemnifying Party and the Indemnified Party shall attempt in good faith to agree upon the rights of the respective parties within 30 days of receipt of such Claim Certificate with respect to each of such claims to which the Indemnifying Party has objected. If the Indemnified Party and the Indemnifying Party agree with respect to any of such claims, the Indemnified Party and the Indemnifying Party shall promptly prepare and sign a memorandum setting forth such agreement and, if applicable an instruction to the Escrow Agent. Should the Indemnified Party and the Indemnifying Party fail to agree as to any particular item or items or amount or amounts, then the Indemnified Party shall be entitled to pursue its available remedies for resolving its claim for indemnification.

(APA, Art. IX, § 9.5(a)(ii).)

Misle and SSI executed the Escrow Agreement on April 20, 2011. (Misle Decl., ¶ 8, Ex. D, Escrow Agreement at 1.) The Escrow Agreement contains provisions that set forth the procedures for disbursement of the Escrow Funds. (Escrow Agreement, Art. I, § 1.3(d)-(f).) The parties agreed that disbursements could be made by joint or unilateral instructions. (Escrow Agreement, Art. I, § 1.3(a).)

> In the event the Escrow Agent receives Unilateral Instructions and a related Proof of Notice from the Buyer, the Escrow Agent shall pay the Escrow [Funds] to the account or accounts described in such Unilateral Instructions on the thirtieth day after receipt of such Unilateral Instructions, unless, before the thirtieth day after the date of receipt of such Unilateral Instructions, the Escrow Agent has received a Notice of Dispute and a related Proof of Notice from Misle. In the event the Escrow Agent receives such a Notice of Dispute, the Escrow Agent shall not pay the amount described in such Unilateral Instructions, but shall proceed as set forth in Section 3.5.

(Escrow Agreement, Art. I, § 1.3(c).)

In December 2014, SSI sent Misle a Claim Certificate and served Unilateral Instructions on Wells Fargo seeking indemnification in the amount of $86,604.60 ("December Claim"). (Misle Decl., ¶ 12, Ex. E.) Misle claims that he served a written objection to the claim on SSI. (Compl. ¶ 10; Misle Decl. ¶ 13 (attesting "on information and belief, my counsel at the time I received the [December Claim] served an objection thereto").) It is undisputed, however, that

Misle did not serve a Notice of Dispute on Wells Fargo. As a result, Wells Fargo distributed those funds to SSI.

In August 2015 and April 2016 SSI sent Misle two additional Claim Certificates and served Unilateral Instructions on Wells Fargo. (Misle Decl., ¶ 12, Ex. E.) It is undisputed that Misle did serve a Notice of Dispute as to each of those Claim Certificates on Wells Fargo. This litigation ensued. Misle asserts claims against SSI for breach of contract, declaratory relief, and conversion.[6] SSI counterclaims for breach of contract, equitable indemnity, and declaratory relief.

The Court will address additional facts as necessary in its analysis.

ANALYSIS

Misle moves for partial summary judgment on his declaratory relief claim and partial summary judgment on his breach of contract claim. Misle also moves for summary judgment on SSI's breach of contract claim. With respect to the latter claim, Misle argues, in part, that it is barred by California Civil Code section 47(b) (the "litigation privilege"). At the hearing, the parties stated that a ruling on this issue would assist settlement efforts. Accordingly, for the reasons set forth in the remainder of this Order, the Court DENIES, IN PART, Misle's motion and concludes that the litigation privilege does not bar SSI's breach of contract counterclaim. The Court reserves ruling on the remaining arguments pending the outcome of the parties' settlement conference.

A. Legal Standards Applicable to Motion for Summary Judgment and Adjudication.

"A party may move for summary judgment, identifying each claim or defense … on which summary judgment is sought." Fed. R. Civ. P. 56(a). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment, or partial summary judgment, is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and

[6] SSI has moved for summary judgment on Misle's conversion claim. The Court will resolve that motion by a separate order.

is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *abrogated on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Once the moving party meets its initial burden, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). It is not the Court's task "to scour the record in search of a genuine issue of triable fact." *Id.*; *see also* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. The Litigation Privilege Does Not Bar SSI's Breach of Contract Counterclaim.

Misle argues that SSI's breach of contract claim is barred by the litigation privilege, because the claim based on the fact that Misle filed this suit against SSI. As set forth in California Civil Code section 47, "[a] privileged publication or broadcast is one made: … (b) [i]n any … (2) judicial proceeding[.]" Thus, the privilege will apply "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to

achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The privilege is "'not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.'" *McNair v. City and County of San Francisco*, 5 Cal. App. 5th 1154, 1162 (2016) (quoting *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006)).

Although the litigation privilege generally is invoked to preclude a tort claim, in some circumstances it may preclude a breach of contract claim. *See, e.g.*, *McNair*, 5 Cal. App. 4th at 1169. In order to determine whether to apply the litigation privilege in a breach of contract case, a court looks to "whether its application furthers the policies underlying the privilege," which have been described as "ensur[ing] free access to the courts, promot[ing] complete and truthful testimony, encourag[ing] zealous advocacy, giv[ing] finality to judgments, and avoid[ing] unending litigation." *Wentland v. Wass*, 126 Cal. App. 4th 1484, 1492 (2005).

Misle argues the facts of this case are similar to *Feldman v. 1100 Park Lane Associates ("Park Lane")*, 160 Cal. App. 4th 1467 (2008). In that case, Park Lane filed an unlawful detainer suit against the Feldmans, whom it contended did not have a valid sublease on an apartment. The Feldmans counterclaimed and argued that Park Lane breached the sublease by sending notices challenging their tenancy and by "illegally evicting [them] from the premises, seeking thereby to deprive [them] of their contractual rights to occupancy of the premises." *Id.* at 1473-74, 1494. The court concluded that the breach of contract counterclaim was barred by the litigation privilege. The court reasoned that the "agreement alleged to have been breached was the Addendum [to the master lease], the validity of which was at issue in the unlawful detainer action itself. In the court's view, the Feldmans claimed the *fact* that Park Lane pursued an unlawful detainer action amounted to a breach of the sublease. *Id.* at 1497. Therefore, the court found the Feldmans had not shown their claim "'was based on a breach of a separate promise independent of the litigation.'" *Id.* (quoting *Wentland*, 126 Cal. App. 4th at 1494.) The court also concluded that, under those circumstances, application of the privilege furthered "the policy of allowing access to the courts without fear of harassing derivative actions." *Id.*

In *Wentland*, by contrast, the court concluded the litigation privilege did not apply to bar a

breach of contract claim. That case "arose out of several real estate investment partnerships managed by" Wentland, which resulted in an action for an accounting in which Wentland was named as a defendant. 126 Cal. App. 4th at 1487. Wentland moved for summary judgment, and in opposition the plaintiffs filed a declaration asserting Wentland had engaged in wrongdoing in connection with other investments. *Id.* at 1487, 1489. Wentland filed a cross-complaint against the plaintiffs and alleged the parties had entered into an agreement resolving the dispute about one of those investments. According to Wentland, as part of the resolution the plaintiffs agreed they "would make no accusation or comment that alleged wrongdoing" by Wentland in connection with that transaction. *Id.* at 1487-88, 1489. Wentland argued that plaintiff's statements in their brief and in a declaration in opposition to the motion for summary judgment breached the non-disparagement agreement. *Id.*

The trial court sustained a demurrer to the cross-complaint on the basis that the claims were barred by the litigation privilege, and the *Wentland* court reversed.

> Unlike in the usual derivative tort action, application of the privilege in the instant case does not serve to promote access to the courts, truthful testimony or zealous advocacy. This cause of action is not based on allegedly wrongful conduct during litigation[.] … Rather it is based on a breach of separate promise independent of the litigation[.] … This breach is not simply a communication, but also wrongful conduct or performance under the contract[.] … Like the example of the covenant not to sue in [*Navellier v. Sletten*, 106 Cal. App. 4th 763 (2003)] … application of the privilege would frustrate the purpose of the [parties'] agreement.

Id. at 1494; *see also id.* at 1495 (concluding the cross-complaint sounded in contract, rather than tort, because Wentland alleged the plaintiffs breached the agreement because they promised not to make negative statements about Wentland and not because the comments were false).

The Court concludes that the facts in this case are more analogous to the facts in *Wentland* than the facts in *Feldman*. Contrary to Misle's argument, SSI does not argue the breach is the fact that he filed this lawsuit. Rather, it argues the breach is that he is attempting to recover funds to which he is not legally entitled under the terms of the APA or the Escrow Agreement, because the objections are improper and because Misle failed to follow the required procedures. As in *Wentland*, these *alleged* breaches are "not simply a communication, but also wrongful conduct or

performance" under those agreements.[7] For this reason, the Court also concludes that the policies underlying the privilege would not served by application of the privilege in this case.

Accordingly, the Court DENIES, IN PART, Misle's motion for summary judgment on SSI"s breach of contract claim.

IT IS SO ORDERED.

Dated: February 19, 2017

JEFFREY S. WHITE
United States District Judge

[7] The Court expresses no opinion on which party's interpretation of the relevant agreements is correct.